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Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1974

HAROLD DURKEE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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NO.

HAROLD DURKEE,

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VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Harold Durkee, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Judgment Below

The order of the Court of Appeals, unpublished per Seventh Circuit Rule 28, is reprinted as Appendix A to this Petition, *infra.*

BLEED THROUGH

Jurisdiction

The judgment of the Court of Appeals was entered on May 28, 1975. Petition for rehearing and suggestion for rehearing in banc (pursuant to F.R.App.P. 35(b) & 40), timely filed, was denied on June 26, 1975. (App. B) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 22.2 of the Rules of this Court.

Questions Presented

1. May conviction for violation of the Hobbs Act (18 U.S.C. 1951) be upheld absent proof that interstate commerce was affected?

2. Was the evidence sufficient to sustain conviction for violation of the Hobbs Act (18 U.S.C. 1951) where the alleged "victim" of the extortion was admittedly engaged both in legitimate trade in jewelry and in illegal transactions—including the purchase and resale of known stolen property, including jewelry, and of contraband (marijuana—absent any evidence proving or even tending to prove that the $350 which the "victim" paid came from any of his legitimately (as opposed to illegally) obtained funds, or that said sum, had it not been paid, would have been used to purchase legitimate merchandise from interstate commerce rather than stolen property or contraband?

3. Upon the facts as stated in question (2) above, did the evidence demonstrate any actual or even realistically probable effect upon that interstate commerce (*i.e.*, legitimate commerce) which the Hobbs Act was designed to protect?

Statute Involved

The Hobbs Act, 18 U.S.C. 1951, provides in pertinent part:

> § 1951. *Interference with commerce by threats or violence*
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

STATEMENT OF THE CASE

Petitioner, Harold Durkee, was found guilty by a jury[1] of both a substantive and a conspiratorial violation of the Hobbs Act, 18 U.S.C. 1951, arising out of a single alleged extortionate occurrence,[2] as charged in a two-count indictment, 74 CR 15. (R. 1, A. 1-3).[3] The trial court denied

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[1] Petitioner was jointly indicted and tried with two co-defendants, Michael McCarthy and Ronald Uginchus, who were also found guilty as charged. All their convictions were affirmed by the Court of Appeals. (App. A)

[2] Count 1 alleged that on or about September 10, 1973, defendants obstructed, delayed and affected commerce and the movement of jewelry and other articles in commerce, in that they obtained $350 from William Leverence, a jeweler engaged in interstate commerce, with his consent, induced by the wrongful use of fear of economic harm and under color of right, by threatening to use their positions as Chicago police officers to impede, obstruct and prevent carrying on the business of Leverence jewelers unless and until Leverence paid defendants $350, in violation of 18 U.S.C. 1951. Count 2 charged that from September, 1973, and continuing thereafter to the date the indictment was filed, defendants conspired to commit extortion, which extortion would and did obstruct, delay and affect commerce and the movement of jewelry and other articles in commerce, in that defendants would and did wrongfully use their positions as Chicago police officers to unlawfully obtain various sums of money, which money was not due them or the Chicago Police Department, and which money would be and was obtained by defendants from the same William Leverence, with his consent, said consent being induced by fear of economic harm and under color of official right, in violation of 18 U.S.C. 1951. (R. 1, A. 1-3)

[3] "R." refers to the Record on Appeal, "Def. Br." to petitioner's Brief, and "A." to the Appendix to that Brief, all heretofore filed in the Court of Appeals for the Seventh Circuit in cause No. 74-1911; "Tr." refers to the Transcript of Proceedings; and "App. A" to Appendix A to this Petition.

petitioner's motion for judgment of acquittal at the close of the government's case, (A. 3), and denied his post-trial motions as well. (R. 60, 62) Petitioner was sentenced to 9 months imprisonment upon each of the two counts, sentences to run concurrently. (R. 63, A. 4) The Court of Appeals for the Seventh Circuit affirmed. (App. A)

The facts directly pertinent to the questions raised in this petition are as follows:

While it was stipulated that certain of Leverence's inventory for resale in Illinois was obtained from states outside Illinois (R. 55A), there was undisputed evidence that Leverence knowingly was engaged in various illegal enterprises—including purchase of stolen items, including jewelry, for resale, and purchase and resale of marijuana—simultaneous with his legitimate business. (Tr. 10, 30, 35-36, 78, 83, 87, 153, 635, 684-91) There was no evidence as to whether the source of the $350 removed from his office represented money earned from illegal or legal business, or whether, had he not given this sum to the officers, he would have used it for the purchase of legal or illegal property.

Other facts adduced at trial, not essential to an understanding of the issues presented herein, are briefly summarized as Appendix C to this Petition in order to permit the Justices to view the issues presented in the context and factual framework of this particular case as it was actually prepared and tried.

REASONS FOR GRANTING THE WRIT

The evidence was insufficient to sustain conviction, where the alleged "victim" of the extortion was admittedly engaged both in legitimate trade in jewelry and in illegal transactions—including the purchase and resale of known stolen property, including jewelry, and of contraband (marijuana). Therefore, the evidence failed to demonstrate any actual or even realistically probable effect on that interstate commerce which the Hobbs Act (18 U.S.C. 1951) was designed to protect (i.e., legitimate commerce), inasmuch as there was no evidence proving or even tending to prove that the $350 which the "victim" paid came from any of his legitimately (as opposed to illegally) obtained funds, or that said sum, had it not been paid, would have been used to purchase legitimate merchandise from interstate commerce rather than stolen property or contraband. Certiorari should be granted so that this Court may scrutinize the Seventh Circuit's unprecedented extension of the Hobbs Act to reach the instant factual situation, and may speak to a proper construction of that Act.

The statute for violation of which petitioner was convicted, 18 U.S.C. 1951, the Hobbs Act, was designed to protect the channels of interstate commerce from obstruction or interference by robbery or extortion. *Stirone* v. *United States,* 361 U.S. 212, 215, 218 (1960). This Court has been careful strictly to construe the Act, with great deference to maintenance of the delicate state-federal balance. *Enmons* v. *United States,* 410 U.S. 396, 411-12 (1973).

In affirming petitioner's convictions in the case at bar, however, the Seventh Circuit has extended the Hobbs

Act's coverage beyond permissible limits. The instant decision is, we submit, the latest in a series of Seventh Circuit cases stretching the Hobbs Act to and beyond the breaking point. For the Seventh Circuit's most recent pronouncement as to the scope and intended reach of the Hobbs Act prior to the instant decision, see *United States* v. *Staszcuk,* No. 73-1869 (en banc, not yet reported, decided May 16, 1975; original opinion at 502 F.2d 875 (7 Cir. 1975); pet. for cert. filed 6/13/75, No. 74-1579).[4]

Surely Congress had no intent to protect or promote commerce in *illegal* commodities. Yet, by prosecuting and convicting petitioner herein for having violated the Hobbs Act for the conduct demonstrated by this record, the government has done precisely that—that is, it has protected, promoted and condoned the conducting by William Leverence, the alleged "victim," of his various nefarious enterprises.

And by affirming petitioner's convictions in the face of his argument as advanced on appeal[5]—despite unrefuted

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[4] While the en banc opinion in *Staszcuk* gives to the Hobbs Act its broadest possible reading of any published decision to date, even *Staszcuk* does not countenance the result in the case at bar. In *Staszcuk,* a majority of the full court affirmed conviction even though interstate commerce was not in fact affected at all, because plans to build an animal hospital (made possible by rezoning which had been facilitated by an extortionate payment to defendant, an alderman) fell through after the rezoning had been accomplished. Affirmance was based upon evidence that if the plans had been carried out (as had been anticipated at the time of the extortionate payment and the rezoning), commerce would have been affected. (Uncontroverted evidence was adduced that the aborted plans necessarily would have involved use of materials from outside Illinois.) However, nothing in *Staszcuk* suggests a reading of the Hobbs Act as herein, in effect, *promoting illegal commerce.*

[5] Def. Br. Point 1(B), raises the issue presented in this petition.

evidence of Leverence's illegal dealings—the Seventh Circuit has placed its judicial imprimatur on the government's action, the effect of which amounts to promotion of traffic in stolen goods and contraband.

As noted by the court, (App. A, p. 3), it was stipulated that certain of Leverence's legitimate inventory for resale in Illinois was obtained from states outside Illinois. (R. 55A) However, the court completely ignores the thrust of the fact that Leverence admittedly engaged, not only in the legitimate business of reselling lawfully obtained jewelry, but also in various illegal businesses, including the purchase and resale of stolen items, including jewelry, and purchase and resale of marijuana. (Tr. 10, 30, 78, 83, 153, 635, 684-91) Moreover, Leverence's traffic in stolen goods took place at the same location where he also engaged in the legitimate sale of jewelry. (Tr. 687)

The money Leverence testified he gave the officers after they confronted him with his purchase of the lens from Bodie,[6] came from the safe in his place of business. (Tr.

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[6] James Bodie, an admitted "fruit hustler," (*i.e.*, he would rob and extort money and valuables from homosexual men he had "picked up" at the Greyhound Bus Station in Chicago; Tr. 85-86, 238-43), sold the items he thus obtained to "fences" such as Leverence. (Tr. 78) For the past ten years he had regularly sold such stolen merchandise to various persons (Tr. 80-83), including Leverence. (Tr. 10, 35-36, 78, 83). Leverence admittedly knew of Bodie's activities in this regard and knowingly purchased stolen property for resale from him, as well as from others like him. (Tr. 684-91)

The lens which Bodie "sold" to Leverence just before defendants allegedly extorted Leverence was believed by Leverence to have been stolen property. (Tr. 31, 639-49)

For additional facts, see App. C.

653-54) There is not a shred of evidence whether this money was derived from Leverence's lawful business or from his illegal activities, nor whether, had the money not been paid, it would have been used to purchase lawful or illegal items for resale.

On this state of the evidence, it is impossible to find that "commerce" as that term is defined in 18 U.S.C. 1951, and necessarily meaning legitimate commerce, was in any was affected by petitioner's conduct. An actual (or realistically probable[7]) effect on commerce is prerequisite to conviction on either Count, *Stirone* v. *United States,* 361 U.S. 212 (1960), and there is nothing in the evidence from which this necessary element is either proven or properly inferable.

Nonetheless, in an unconscionable over-extension of the Hobbs Act to a point beyond the pale of any legitimate reading of the statute or interpretation of congressional intent, the Seventh Circuit finds that this essential jurisdictional element has satisfactorily been proven. (App. A, p. 3)

The court's reliance on cases involving police extortion of tavern owners, *United States* v. *DeMet,* 486 F.2d 816 (7 Cir. 1973), and *United States* v. *Gill,* 490 F.2d 233 (7 Cir. 1974), (App. A, p. 3), is misplaced, since those cases are not factually in point.

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[7] Per the en banc majority opinion in *Staszuck, supra,* even if there is no actual effect on commerce, the jurisdictional element of the statute is satisfied if there is a showing of a "realistic probability that an extortionate transaction will have some effect on interstate commerce." (No. 73-1869, sl. op. p. 11) But under the facts as adduced in the case at bar, there is not even any showing of "realistic probability." See footnote 4, p. 7, *supra,* and accompanying text.

In *DeMet,* tavern owners were being forced to "pay off" police to prevent being arrested for alleged liquor license violations (*e.g.,* staying open after hours), while in *Gill* the threat was to arrest a tavern owner for illegally having sold liquor to a minor. These situations cannot properly be compared to the case at bar, inasmuch as the violations allegedly being committed by the tavern owners in those cases constituted *malum prohibitum* offenses intimately connected with and directly resulting from the carrying out of the victims' legitimate businesses, while Leverence's purchase of a stolen camera lens from a known "fruit hustler" cannot similarly be characterized. The latter, rather, constitutes a separate and distinct, *malum in se,* illegal act not connected to or resulting from Leverence's legitimate business.

United States v. *Augello,* 451 F.2d 1167 (2 Cir. 1971), also relied on by the court, (App. A, p. 3), is not contrary to petitioner's position herein; for in *Augello,* there was not, as here, the simultaneous carrying out of legal and illegal businesses from the same location. *Augello* thus does not cut against petitioner's argument.

Petitioner's failure to cite any cases directly supporting his position (see App. A, p. 3), is due to the simple fact that this case is factually unique.

In view of the nature of Leverence's various businesses, legitimate and otherwise, and in the absence of any evidence ear-marking the funds paid as either having been derived from or intended for legitimate commerce, petitioner's convictions should be reversed.

• • •

Proper construction of congressional legislation is essential to the orderly administration of justice. Granting certiorari in the instant case would permit this Court to scrutinize the Seventh Circuit's unprecedented extension of the Hobbs Act which permits it to reach the instant factual situation,[8] and would give this Court an excellent opportunity definitively to construe the Act.

Certiorari should be allowed so that the Seventh Circuit's unwarranted interpretation of the Hobbs Act—which permits that Act and the judicial system to be used for the furtherance of illegal enterprise—may not stand as law.

CONCLUSION

To resolve the question herein presented regarding the proper construction of the Hobbs Act—constituting an important issue of federal law which has not been, but should be, decided by this Court—certiorari should be allowed to review the judgment of the Seventh Circuit; and, upon review, petitioner's convictions should be reversed for insufficiency of the evidence.

Respectfully submitted,

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[8] Moreover, it should also be noted that since petitioner's alleged conduct is readily denounceable as criminal by State law, [see Chap. 38, secs. 33-1 (bribery) and 33-3 (official misconduct), Ill. Rev. Stat. 1973], this Court's policy as enunciated in *Enmons* v. *United States*, 410 U.S. 396, 411-12 (1973), militates against such an over-broad reading of the Hobbs Act.

APPENDIX

APPENDIX A

In The

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 74-1911

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MICHAEL McCARTHY, RONALD UGINCHUS, and HAROLD DURKEE,

Defendants-Appellants.

ORDER [entered May 28, 1975, by Chief Judge Fairchild and Circuit Judges Pell and Tone] [Unpublished per Seventh Circuit Rule 28].

In this appeal from their convictions on charges of extortion and conspiracy to commit extortion in violation of the Hobbs Act, 18 U.S.C. § 1951, defendants raise essentially eight separate issues. Finding no reversible error, we affirm the convictions.

Issues I, II and III

On three different grounds, defendants challenge the sufficiency of the evidence. First, they allege that a defense of entrapment was established as a matter of law. The government counters that the entrapment defense should be rejected as a matter of law, for, says the government, whatever the object of the "set-up" for Lever-

ence, whether to extort money or obtain an informant, it is clear from the evidence that the defendants were not entrapped by Bodie into their subsequent course of conduct, although he provided the opportunity for the offense. Compare *Sherman* v. *United States,* 356 U.S. 369, 373 (1958), with *United States* v. *Smith,* 508 F.2d 1157 (7th Cir. 1975).

The Supreme Court has stated in *Sorrells* v. *United States,* 287 U.S. 435, 441-442 (1932):

> ". . . the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution . . . . A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."

See also *United States* v. *Russell,* 411 U.S. 423, 433-436 (1973); *United States* v. *Smith, supra,* 508 F.2d at 1158; *United States* v. *Haden,* 397 F.2d 460, 466 (7th Cir. 1968), *cert. denied,* 396 U.S. 1027 (1970).

Here the evidence does not establish entrapment as a matter of law. We need not decide whether it establishes that as a matter of law there was no entrapment, because the trial judge submitted the issue to the jury with appropriate instructions, and there was ample evidence to support its rejection of the defense of entrapment. Bodie, a paid federal informant, apparently first brought to defendant McCarthy's attention the fact that Leverence was vulnerable to a "set-up." But there was evidence from which the jury could have found that it was McCarthy who for several years "repeatedly asked Bodie to help him 'set-up' Leverence," and it was not until the summer

of 1973 that Bodie finally contacted McCarthy and "asked McCarthy whether he still wanted to get Leverence." This evidence indicated that Bodie did not induce McCarthy to commit the offense, and that in fact it was McCarthy who pressed Bodie to participate in the "set-up" scheme over a period of years before Bodie agreed to cooperate. The evidence amply supported the jury's resolution of the issue of entrapment against defendants.

Defendants' second argument regarding the sufficiency of the evidence is that the jurisdictional element of the effect on interstate commerce of the alleged extortion from Leverence of $350 was not proven because the evidence did not show that the money came from legitimate, as opposed to illegally obtained, funds, or that the money would have been used to purchase legitimate merchandise in interstate commerce. That Leverence bought substantial amounts of jewelry and other merchandise from outside Illinois as part of his legitimate jewelry business was stipulated by the parties. The reasoning of the tavern-owner extortion cases applies here: although a portion of Leverence's business was illegal and some of his funds thus illegally obtained, the "depletion of . . . [his] assets by the . . . money extorted, or the cessation of his business if he did not yield and his fears were realized, would tend to reduce the demand for and amount of" legitimate merchandise, in this case jewelry and supplies, "moving into Illinois." *United States* v. *DeMet,* 486 F.2d 816, 821 (7th Cir. 1973), *cert. denied,* 416 U.S. 969 (1974); see *United States* v. *Gill,* 490 F.2d 233, 236-237 (7th Cir. 1973), *cert. denied,* 417 U.S. 968 (1974); see also *United States* v. *Augello,* 451 F.2d 1167, 1169 (2d Cir. 1971), *cert. denied,* 405 U.S. 1070 (1972). Defendants cite no cases to the contrary. Thus, we conclude that the jurisdictional requirement of effect on interstate commerce was satisfactorily demonstrated.

The third contention concerns only the sufficiency of the evidence as to defendant Durkee. Regardless of whether Durkee was involved from the outset, and there is some evidence from which the jury could have inferred that he was, it was unnecessary for the government to prove that he was a member of the conspiracy at its inception, if it proved he later became a member. *United States* v. *Hickey,* 360 F.2d 127, 138 (7th Cir. 1966), *cert. denied,* 385 U.S. 928 (1966). The record contains evidence that Durkee participated in planning discussions in the Garrick Restaurant and in McCarthy's car on the way to Leverence Jewelers, and that he actually participated in carrying out the extortion itself by handing Bodie the camera and giving him some final instructions, by placing Leverence under arrest and later telling him he could probably beat the charge but did not need the aggravation, by asking Leverence "what it was worth for them to forget about it," by bargaining for a payment larger than $350, by agreeing to the $350 after consulting McCarthy, by accompanying Leverence on the trip to the bank, and by accepting the payoff money and giving Bodie his $90 share of it. It was of course unnecessary to prove a formal agreement to participate in the conspiracy. See *United States* v. *Robinson,* 470 F.2d 121, 123 (7th Cir. 1972).

Issues IV and V

The defendants contend that the trial court improperly and prejudicially restricted the scope of their cross-examination of the two leading government witnesses. First, they argue that it was an abuse of discretion not to permit them to cross-examine Leverence as to a conviction, occurring 10 years earlier when he was 19 years old, based on fraudulent use of a credit card, on the theory that it "involved dishonesty" and thus had a direct bearing on his testimonial credibility. The trial court conducted a

voir dire on the proposed testimony and ruled that it should be excluded. Even though the Federal Rules of Evidence are not yet in effect, we turn to Rule 609 for guidance, as we have directed the district courts to do (*United States* v. *McCarthy*, 445 F.2d 587, 590 (7th Cir. 1971)). We assume the conviction in question comes within the scope of admissibility described in paragraph (a) of Rule 609, but it would not be admissible, by reason of paragraph (b) of that rule, because it occurred over 10 years ago, "unless the court determines, in the interests of justice, that the probative value of the conviction . . . substantially outweighs its prejudicial effect." Because of this presumption of inadmissibility for convictions more than 10 years old, the fact that the offense was committed when Leverence was only 19 years old, and the admission of other, much more persuasive impeachment evidence which made evidence of the early conviction merely cumulative in its impeachment effect, restriction of cross-examination on this subject was not an abuse of discretion.

Defendants also complain that the trial court restricted their cross-examination of Bodie. This claim is completely without merit. At no time did the trial court limit the questioning of Bodie. Rather, as the transcripts show, the defense attorneys made a tactical choice not to ask the court to instruct the recalcitrant witness to answer the question, and by not pressing the questioning on the subject the witness' use of drugs any further.

Issue VI

Defendants argue that Count II of the indictment was legally insufficient to charge a violation of the Hobbs Act because it failed to allege the elements of a Hobbs Act conspiracy. First, the indictment is said to have failed to

allege a conspiracy aimed at obstructing commerce, as opposed to extortion. This argument has been explicitly rejected by this court in *United States* v. *Pranno,* 385 F.2d 387, 389-390 (7th Cir. 1967), *cert. denied,* 390 U.S. 944 (1968), which is controlling here. Second, defendants argue that the indictment was defective because it failed to allege the commission of an overt act. By alleging specifically that defendants did "unlawfully obtain and cause to be obtained . . . various sums of money, which money was not due them . . . and was obtained by the defendants from William Leverence, with his consent, said consent being induced by fear of economic harm . . .," the indictment in effect, though not in as many words, alleged an overt act. An allegation of an overt act is not required, however, where the offense alleged is a section 1951 conspiracy. Defendants' argument to the contrary has been rejected by the Fifth Circuit in *Ladner* v. *United States,* 168 F.2d 771, 773 (5th Cir. 1948), *cert. denied,* 335 U.S. 827 (1948), which rests on a line of Supreme Court cases holding that statutes "punish[ing] conspiracy 'on the common law footing'" do "not require an overt act for the offense . . . ." *Singer* v. *United States,* 323 U.S. 338, 340 (1944); *Nash* v. *United States,* 229 U.S. 373, 378 (1913). These cases are controlling here.

Issues VII and VIII

In light of our holding on Issue VI, *supra,* that an overt act need be neither alleged nor proven under section 1951, we do not reach the questions raised by defendants' remaining arguments that there was a fatal variance between the indictment and the instructions concerning the necessity of proving an overt act and that a reversal on Count II necessitates reversal of Count I as well.

AFFIRMED.

APPENDIX B

In The

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 74-1911

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MICHAEL McCARTHY, RONALD UGINCHUS, and HAROLD DURKEE,

Defendants-Appellants.

ORDER entered June 26, 1975, by Chief Judge Fairchild and Circuit Judges Pell and Tone, denying petition for rehearing and suggestion for rehearing in banc.

APPENDIX C

(Summary of Additional Facts)

James Bodie, an admitted "fruit hustler,"[1] for the past ten years had regularly sold stolen merchandise to various persons, (Tr. 80-83), including William Leverence. (Tr. 10, 35-36, 78, 83) Bodie admittedly engaged in the sale of marijuana (Tr. 30, 87, *cf.* 117), and, at the time he testified,[2] was on three years' probation for aggravated battery[3] (Tr. 47, 220). Bodie had known defendant McCarthy for at least six years, having from time to time supplied officer McCarthy with information about criminal activities. (Tr. 36, 76, 993) Bodie had also been acting as an informer for Federal Agent Cavanagh for about the past ten years. (Tr. 17, 317, 423)

Bodie testified for the government that the name "William Leverence" had first come up between himself and defendant McCarthy some six years before 1973, when

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[1] Bodie testified that he would "hustle fruits" whom he met at the Greyhound Bus Station in Chicago, by which he meant, according to his testimony, that he would pretend to accompany men to a hotel room for homosexual conduct, and then would rob them of watches, jewelry and other valuables under threats of violence or public exposure. (Tr. 85-86, 238-43). He sold these items to "fences," such as Leverence. (Tr. 78) Leverence knew of Bodie's activities in this regard. (Tr. 684-91)

[2] Bodie admittedly received $290 from federal agents in connection with his cooperation and testimony in this cause. (Tr. 37). Additionally, he received $60 in witness fees, plus $20 for each interview at the federal building. (Tr. 164-66)

[3] Moreover, Bodie had not reported to his probation officer since September, 1973, although he was still required to do so by the terms and conditions of his probation. (Tr. 226)

Bodie had advised McCarthy that he (Bodie) sold some of the items he stole to Leverence, a jeweler. (Tr. 8-10, 78) Bodie mentioned Leverence's name initially. (Tr. 78) Bodie testified that from time to time during the next six years, McCarthy repeatedly asked Bodie to help him "set up" Leverence, by having Bodie sell Leverence some "hot" property, then having McCarthy confront Leverence with the prospect of arrest for receiving stolen property or a payoff to the police. (Tr. 7-13, 48-49) During the summer of 1973, Bodie was in need of money, and asked McCarthy whether he still wanted to get Leverence. (Tr. 15-16; *cf.* Tr. 112-14) McCarthy (according to Bodie) responded in the affirmative, and they arranged to "set up" Leverence on September 3, 1973. (Tr. 116) Defendant Uginchus was present but was not a party to the conversations between Bodie and McCarthy when this was discussed. (Tr. 14-16)

Bodie then contacted federal agent Cavanagh by phone [4] and related the plan to him (Tr. 17-19, 317-19); Cavanagh asked that the meeting be postponed. (Tr. 19, 319) It was eventually delayed until September 10, 1973. (Tr. 19-21, 143-45)

On September 10, 1973, federal agents (including Cavanagh) equipped Bodie with a concealed microphone and radio transmitter, with the agents having a receiver and recording device concealed in an attache case, which receiver was adjusted to pick up transmissions from the transmitter on Bodie's person. (Tr. 23, 147, 326-29)

Bodie met all three defendants at the restaurant above the Greyhound Station (Tr. 24-27), and they proceeded to

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[4] Apparently, Bodie's anger at a remark (calling Bodie a "fucking punk") made by Uginchus precipitated Bodie's contacting agent Cavanagh. (Tr. 109, 111-12)

the Mallers Building, wherein Leverence's jewelry store was located. (Tr. 28-30). Bodie had never seen petitioner before. (Tr. 26-27) While Bodie went into Leverence's offices, federal agents waited outside, unseen, recording the transmissions.[5] (Tr. 336-37, 415-17) After some preliminary negotiations, Leverence purchased a presumably stolen camera lens from Bodie for $50 (Tr. 151-52), which sum he paid by check to Bodie. (Tr. 29-30, 639) While Bodie testified that defendants supplied the item to be sold to Leverence, (Tr. 15-16, 28), the officers all testified that Bodie himself had supplied the property, having turned it over to McCarthy and Uginchus previously for that precise purpose. (Tr. 1011, 1026)

After Bodie emerged from Leverence's office, defendants entered and told Leverence he was in legal trouble for having bought the lens from Bodie. (Tr. 31, 639-43) Leverence, McCarthy and Durkee went into Leverence's private office, while Bodie and Uginchus waited in the outer office. (Tr. 31-32, 645-49) (The conversation in this private office is not corroborated by any tapes.)

Leverence testified that the officers told him he "would have to go downtown," *i.e.*, to the police station, to be booked and charged with receiving stolen property unless he gave them money. (Tr. 644-49) After an abortive attempt to get money from his bank, (Tr. 652-53), Leverence pretended to borrow $350 cash from another jeweler in the Mallers building, but in fact, according to his testi-

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[5] Government's Exhibits 2, the tape itself, and 3 (as revised), the transcript thereof, were admitted upon stipulation of accuracy. (R. 44) The tape and transcript include conversations in the restaurant before Bodie and defendants went to the Mallers Building, and in Leverence's outer office.

mony, obtained it from his safe. (Tr. 34, 653-54) Leverence gave petitioner an envelope containing $350 (Tr. 655) which, according to Bodie, was divided among himself (receiving $90) and the officers. (Tr. 34-35) Nothing regarding any "split" of the money appeared on the tapes. (Tr. 405-06) Bodie was not under surveillance for at least 20 minutes after he left defendants and before he reported to Cavanagh. He had had a drink at a bar in the interim. (Tr. 35, 269-71, 437-39) Bodie turned $90 over to Cavanagh. (Tr. 338, 449) Cavanagh did not search Bodie for any additional money. (Tr. 422-23) According to defendants, 100% of the money was given to Bodie, (Tr. 1036-38, 1148-49, 1208-09), since their interest was solely in gaining Leverence's future cooperation as an informer concerning various burglaries and receipt of stolen property involving persons in the Mallers Building. (Tr. 1031-32, 1068, 1130, 1203-09).

Substantial uncontroverted evidence adduced by the prosecution as well as the defense established that law enforcement officers' reliance upon undercover civilian informants is a commonly accepted law enforcement practice, that developing persons to act in such capacity is frequently a necessary part of police work, and that the need to rely upon such individuals is particularly great in order to solve "non-eyewitness" crimes such as burglary. (Tr. 519, 546-47, 936-79) [6]

The court refused to permit defense counsel to cross-examine Leverence concerning his prior conviction in the State of California for fraudulent use of credit cards. (Tr. 617-29, 662-73)

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[6] All cited testimony in this regard is from witnesses other than defendants.

The court interrupted defense cross-examination of Bodie regarding his immediate past use of drugs and controlled substances [7] (Tr. 157), and Bodie refused to answer pertinent questions posed later during cross-examination regarding his present and immediate past use of various "hard" drugs.[8] (Tr. 244)

All defendants testified. McCarthy's testimony was that Bodie instigated the events concerning Leverence, and that Bodie furnished the merchandise sold to Leverence. (Tr. 1014-1153) All the officers testified that their purpose was not to obtain any money from Leverence, but solely to gain information regarding criminal activity known to Leverence in and about the Mallers Building, (Tr. 1031-32, 1068, 1130, 1203-09), particularly concerning a large jewelry theft therein, to which still-open burglary investigation McCarthy had been assigned. (Tr. 987-90, 999-1000) All defendants testified that Bodie alone got all the money which had been obtained from Leverence, and put it in his (Bodie's) shoe. (Tr. 1036, 1148, 1153, 1209-11) While Uginchus had been in McCarthy's company during some

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[7] After Bodie had admitted previous marijuana use, Bodie answered defense counsel's question, "When did you stop [smoking marijuana]," by stating. "That is my own personal business and none of yours." (Tr. 157) To: "When is the last time you used marijuana," Bodie replied, "It is none of your business." (Tr. 157) The court then terminated this line of questioning *sua sponte*. (Tr. 157)

[8] Q. [by defense counsel]: Did you ever use any other form of drug or narcotic? Did you ever use speed?
A. [Bodie]: Whatever I used, it doesn't make any difference.
Q. My question simply is—
A. I think what I have done in that field is my business. If I have done drugs, it is my business. It is not anyone's business. It is my own personal business." (Tr. 244)

of the preliminary discussions with Bodie (Tr. 14-6, 1007-08), petitioner, who coincidentally was at the police station when McCarthy and Uginchus were about to leave to keep their appointment with Bodie on September 10, 1973, just happened to go along to assist them in developing Leverence as an informer. (Tr. 1023-24, 1133, 1197-99) McCarthy and Uginchus were assigned to Area 1 Burglary, while petitioner was assigned to Area 1 Robbery, different units of the Chicago Police Department located in the same building (Tr. 1197) at the time of the events in question. (Tr. 986, 1115, 1187). A number of character witnesses testified for each defendant. (See Tr. 890-979)

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-6

HAROLD DURKEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petiioner contends that the evidence of an effect on interstate commerce was insufficient to sustain his conviction.

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of extortion and conspiracy to commit extortion, in violation of the Hobbs Act, 18 U.S.C. 1951.* He was sentenced to concurrent terms of nine months' imprisonment. The court of appeals affirmed (Pet. App. A).

*Michael McCarthy and Ronald Uginchus were convicted with petitioner of extortion and conspiracy to commit extortion. Their convictions also were affirmed on appeal (Pet. App. A), but they have not joined in the present petition.

The evidence showed that petitioner and several other members of the Chicago Police Department arranged for James Bodie to sell a stolen camera lens to William Leverence so that they could extort money from Leverence (Tr. 10-15, 108). On September 10, 1973, Bodie went to Leverence's jewelry store and sold the lens to Leverence (Tr. 24-30, 638-639). Shortly thereafter, petitioner and the other officers arrived and informed Leverence that the lens was stolen (Tr. 31, 641-642). Petitioner told Leverence that he was under arrest, but that for $1,000, he and the other officers would "forget about it" (Tr. 645-646, 679). After some negotiation, Leverence gave petitioner $350 in cash from the safe in Leverence's office (Tr. 34, 646-655).

At petitioner's trial, it was stipulated that Leverence's jewelry store, located in Chicago, purchased some jewelry from local suppliers who obtained their jewelry from sources outside Illinois. Leverence testified that he purchased additional jewelry directly from suppliers in New York (Tr. 636). Leverence also admitted purchasing marijuana and stolen property for resale (Tr. 10, 30, 78, 83, 153, 635, 684-691).

Petitioner contends that there was insufficient evidence that the extortion affected interstate commerce because the evidence was insufficient to show that Leverence had obtained the $350, which was extorted from him, from legal activities or that Leverence would have used the extorted money to make legal purchases of jewelry from interstate commerce. Viewed in the light most favorable to the government, there was ample evidence at trial from which the jury reasonably could have concluded that the $350 extorted from Leverence deprived him of part of the assets he needed for legitimate purchases of jewelry from interstate commerce. See *Glasser* v. *United States*, 315 U.S. 60, 80. Whether the $350 was obtained legally

by Leverence is irrelevant since the extortion deprived him of assets with which to conduct his legitimate jewelry business. Accordingly, as the court below held, the evidence was sufficient to establish the requisite effect on interstate commerce (Pet. App. 3). *United States* v. *Gill,* 490 F.2d 233, 237 (C.A. 7), certiorari denied, 417 U.S. 968; *United States* v. *De Met,* 486 F.2d 816, 821-822 (C.A. 7), certiorari denied, 416 U.S. 969.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.